Office-Supreme Court, U.S.
FILED
MAR 7 1983
ALEXANDER L. STEVAS,
CLERK

82-1486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO.

CHEVRON CHEMICAL COMPANY, A Delaware Corporation,
Petitioner,

vs.

HON. HORACE W. GILMORE, United States District Court Judge for the Eastern District of Michigan,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT OR IN THE ALTERNATIVE, PETITION, FOR WRIT OF MANDAMUS

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THE INLAND PRESS, DETROIT, MICHIGAN

QUESTIONS PRESENTED

I.

Whether a district judge (Respondent), in an otherwise properly removed action, should allow joinder of a nondiverse, nonindispensable party even though such joinder results in remand?

II.

Whether an order of remand predicated upon such joinder (which has not, in fact, been entered at the time of remand) is reviewable under *Thermtron Products Inc.* v. *Hermansdorfer*, 423 US 336 (1976) in this Court by mandamus?

III.

Whether a district judge's (Respondent's) *sua sponte* entry of a "sham" and "form" order of remand which recites the rubric of 28 USC §1447(c) but which, in fact, is predicated upon wholly different and unauthorized grounds, is reviewable in this Court by mandamus?

IV.

Whether 28 USC §1447(d) is to be read in conjunction with §§13 & 14 of the Judiciary Act of 1789, as ultimately consolidated into 28 USC §1651(a), so as to permit this Court to exercise its authority to supervise the arbitrary and capricious conduct of the inferior federal judiciary (Respondent), notwithstanding 28 USC §1447(d) and the fact that such conduct occurred in the context of remand proceedings?

V.

Whether 28 USC §1447(d), as read by the Court of Appeals to preclude exercise of mandamus jurisdiction to correct the otherwise arbitrary and capricious conduct of an inferior federal judge (Respondent) solely because such occurred in the remand context, constitutes an unconstitutional encroachment and limitation by Congress upon Article III functions of this Court?

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OCTOBER TERM, 1982

NO.

CHEVRON CHEMICAL COMPANY, A Delaware Corporation,
Petitioner,

vs.

HON. HORACE W. GILMORE, United States District Court Judge for the Eastern District of Michigan,
Respondent.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT OR IN THE ALTERNATIVE, PETITION, FOR WRIT OF MANDAMUS

Petitioner prays that a writ of *certiorari* issue to review the Order of the United States Court of Appeals for the Sixth Circuit, entered December 10, 1982, denying the Petitioner's Petition for a writ of mandamus; or in the alternative, Petitioner prays this Court issue a writ of mandamus to the United States Court of Appeals for the Sixth Circuit compelling it to direct the Respondent to vacate the Order of Remand

[1] As required by Rule 21.1(b) the following gives a history of this case and lists all the parties. In the United States District Court For The Eastern District Of Michigan, the matter was captioned *Marie E. Munn & George E. Munn, Plaintiffs* v *Chevron Chemical Company, Defendant*, Civil Action No. 81-70555. When mandamus review was sought in the United States Court of Appeals for the Sixth Circuit that matter was captioned, as required by Sixth Cir. R. 23, *In re: Chevron Chemical Company, Petitioner*, Case No. 82-8063.

The Munns, Plaintiffs below and (real) Respondents herein, are Michigan citizens. Mr. George Munn is deceased.

Also pursuant to Rule 28.1, Supreme Court Rules, Petitoner Chevron Chemical Company is a Delaware Corporation and is wholly owned by Standard Oil Company of California, a Delaware Corporation. There are a number of affiliate corporations, each including "Chevron" in their company name and all of which are wholly owned by Standard Oil Company of California.

entered by him dated September 27, 1982, or, in the further alternative, to issue a writ of mandamus directly to the Respondent compelling him to vacate said Order.

RULE 28, RULES OF THE SUPREME COURT

Notice is hereby given that 28 USC 2403(a) may be applicable. To the best of Petitioner's knowledge, no court has certified to the Attorney General the fact that the constitutionality of 28 USC §1447(d) has been drawn in question.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit dated December 10, 1982 denying Petitioner's Petition for Writ of Mandamus is unreported and appears in the Appendix, pp. 1a-3a. The Ruling and the Order of the United States District Court for the Eastern District of Michigan remanding the action styled *Maria E. Munn and George E. Munn* v *Chevron Chemical Company*, No. 81-70555, to Wayne County (Michigan) Circuit Court are set forth, respectively, in the Appendix hereto, pp. 3a-6a.

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit was entered on December 10, 1982. The Jurisdiction of this Court is invoked pursuant to 28 USC §1254(1), or, alternatively, pursuant to 28 USC §1651(a).[2]

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[2] Where a Court of Appeals has denied a petition for a writ of mandamus to review an improper Order of Remand as is involved here, this Court has elected to review the same under its statutory *certiorari* jurisdiction over the Courts of Appeals, 28 USC §1254(1). *See Petition for Writ of Certiorari, Thermtrom Products, Inc.* v *Hermansdorfer*, at 2; *Thermtrom Products, Inc.* v *Hermansdorfer*, 420 US 923 (1975) (*certiorari* granted); *Thermtrom Products, Inc.* v *Hermansdorfer*, 423 US 336 (1976). In fact, this appears to be the preferred procedural avenue of review, *see* 9 *Moore's Federal Practice* ¶110.27. However, there is nothing precluding this Court from reviewing such a matter on an original petition in this Court for mandamus pursuant to 28 USC §1651 (a) or otherwise, in the event this Court elected to use that jurisdictional avenue and/or if review was otherwise precluded.

If the Court elects to assume jurisdiction over this matter as a Petition for an extraordinary writ in the nature of mandamus under the All Writs

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

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All of the above referenced Statutes can be found in the Appendix as permitted by Rule 21.1(f).

STATEMENT OF THE CASE

On February 13, 1981, Plaintiffs, GEORGE E. MUNN and MARIE E. MUNN, (hereinafter PLAINTIFFS) citizens of Michigan, commenced an action against Defendant CHEVRON CHEMICAL COMPANY, a Delaware Corporation with its principal place of business in California (hereinafter PETITIONER), in Michigan's Wayne County Circuit Court. The Complaint alleged that Petitioner had defectively manufactured a product which caused GEORGE E. MUNN to contract a terminal carcinoma (and also caused a consequential loss of consortium to MARIE E. MUNN), resulting in damages in excess of ten thousand ($10,000.00) dollars. On February 20, 1981, Petitioner filed a timely Petition for Removal in

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Act, 28 USC §1651(a) or otherwise, as opposed to a Petition for statutory *certiorari*, then, pursuant to Rule 27.1 of this Court, this action should be captioned *In re: Chevron Chemical Company*. Also, if the Court elects to so proceed, an actual Petition is included in the Appendix hereto, pp. 66a-67a, as required by Rule 27.2(a). That Petition incorporates, by reference, the same grounds for issuance of that writ as those that this Petition assert as grounds for issuance of a writ of *certiorari*. Rule 27.2(b).

compliance with 28 USC §§1441 & 1446, in the United States District Court for the Eastern District of Michigan because the action was one that could have been commenced there originally. Petitioners posted a bond and took all other steps necessary to insure proper removal in a timely fashion, as required by 28 USC §1446. Neither the Plaintiffs nor the District Court ever questioned or challenged the removal as being anything but wholly proper. Furthermore, it is uncontroverted that the District Court recognized, assumed and exercised jurisdiction over the case, there being no jurisdictional defects regarding the removal.

After having been assigned to first one District Judge and then another, on September 21, 1982 (19 months after commencement of the action) a motion was made to Amend the Complaint and add, as a Defendant, DOW CHEMICAL COMPANY, a Michigan Corporation. On the same day, the Judge to whom the case was then assigned, disqualified himself on the basis of stock ownership in DOW and the matter was immediately reassigned to the Honorable Horace W. Gilmore, (hereafter RESPONDENT).

On the following day, September 22, 1982, counsel for Petitioner was orally notified that he was compelled to appear, within twenty-four hours (i.e. on September 23, 1982), at a Remand Hearing. On the eve of the trial and at that hearing, the Respondent rejected arguments relative to his lack of authority to add a nonindispensable party (although he acknowledged that this characterization was not incorrect, Appendix p. 5a) and to remand, and focused in upon the "equities" favoring remand. More important than what was argued to, and rejected by Respondent is a purview of the arguments counsel could *not* make simply because of the truncated nature of the proceedings.[3] Correlatively, these arguments — especially the

[3]For example, Petitioner did not have an adequate opportunity to prepare or even file written memoranda in opposition, nor to demonstrate that the very relief sought by Plaintiffs was precluded by Judge Cohn's Order requiring the addition of parties *by September 1, 1982*. He was not able to present substantial authority to the effect that a District Court has no

ones touching upon the history of the case — demonstrate that there was no way Respondent could have possibly familiarized himself with the matter in one day.

Never-the-less, the Court elected to rule immediately, stating the issue was whether to allow the amendment to add Dow and that if the Amendment was allowed, "it destroys diversity and the case would automatically be remanded to Wayne Circuit Court." In a one and one-half page Opinion, Respondent extracted from and focused upon language in a Moore's Federal Practice citation, ruling that he felt there were "strong equities" favoring amendment so that a proper fact finder could make a determination with everyone in front of it. Respondent then granted the Amendment and stated "I will remand the case to the Wayne County Circuit Court." Re-

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discretion to grant an amendment under such circumstances; or that Petitioner could well be left without any remedy to correct the Respondent's abbreviated approach to the motions, given the general prohibition of review of remand orders found in 28 USC §1447(d); or that complex and difficult questions regarding the limited circumstances in which remand is appropriate under 28 U.S.C. §1447(c) are implicated by the case.

There was no opportunity to present arguments regarding the gross inadequacy of the motions to demonstrate particularly how Dow was implicated; as they merely asserted that "Dow *could* be involved in the litigation." These motions also did not specify the nature or identity of the mysterious carcinogenic substance or its relationship to Petitioner's products, or the names, dates and specific testimony of the witness(es) who allegedly triggered counsel's fancy to pursue Dow. Additionally, there was no opportunity to establish that, by admission in their own pleadings, *Plaintiffs' acknowledged a thoroughly wrongfull purpose for their discovery efforts against Petitioner-to seek out new Defendants and bravely go where the Rules do not permit litigants to travel!* Further, Petitioner was unable to establish that a proposed Amended Complaint had not been attached to the Motion.

Moreover, because the Respondent acted with such haste, Petitioner was unable to point to authority warning District Judges to be aware of collusive efforts by Plaintiffs to obtain Remands back to their formerly selected forum; or to argue that the delay inherent in a remand to Wayne Circuit, should be seriously considered by Respondent because the very purpose for the general prohibition against review of remand orders, i.e., to avoid delays, is foiled under such circumstances. Finally, Petitioner was unable to present arguments that explicit language in Fed. R. Civ. P. 19(a) forbids addition of even an indispensable party whose presence destroys diversity jurisdiction but rather only permits the Court to determine whether to continue with the action without the party or to dismiss the action as provided for in Fed. R. Civ. P. 19(b).

spondent neither cited the remand statute, nor did he purport to act pursuant to it, nor did he attempt to enumerate grounds remotely resembling the standard for remand, i.e., that the case was originally removed improvidently and without jurisdiction. 28 USC §1447(c).

Petitioner had intended on contesting, in presentment of order proceedings, any proposed order from Plaintiffs' counsel which did not exactly conform to the Petitioner's September 23, 1982 Opinion and Ruling.[4] However, Petitioner was once again foiled by Respondent's unorthodox abridgements of the normal adversarial processes. Apparently, in an effort to get the matter removed from the docket with all possible haste, (and Petitioner must infer the intent was to accomplish this by the end of the month of September, at which time Respondent was required to file a monthly report with the Dir. Admin. Office of the U.S. Courts, 28 USC §604(a)(2)) Respondent did not wait for a proposed order from Plaintiffs' counsel — much less the conclusion of presentment proceedings.

Rather, on September 27, 1982, Respondent, *on his own Motion*, entered a "form" order of Remand to Wayne County Circuit Court to which the words "lacking total diversity" were added after the form's standard language regarding absence of jurisdiction. This Order in no way reflects the content of Respondent's consideration and Opinion of September 23, 1982 regarding Amendment and Remand.[5] Moreover, at the

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[4] Petitioner wanted to proceed in such a fashion because of the importance the content of such order bears upon any attempt to obtain relief from it in the Court of Appeals or in this Court. Moreover, Petitioner was entitled to present Respondent with those arguments and emphasizes that it was forestalled from making by the truncation of the proceedings prior to the signing of the order.

[5] The Order states the "case was improvidently removed" but there was absolutely *nothing* in the Opinion (or in the entire record of the case) to even intimate that Respondent ever considered the improvidence of removal, either relative to the time the case was removed or at any other time! Similarly, the Order states that "there is no federal jurisdiction . . . lacking total diversity" but the Opinion no where discussed or even mentioned the word jurisdiction; Respondent simply said that *if* he permitted the Amendment diversity would be destroyed and the case would automatically be

time the Order was entered *no Order Granting the Amendment had been entered (n[illegible] has any such order ever been entered) and, therefore, the nondiverse party was not before the Court.*

On October 15, 1982, Petitioner being without any appellate remedy, sought extraordinary relief in the United States Court of Appeals for the Sixth Circuit, by filing a Petition for Writ of Mandamus praying that the Respondent be compelled to Vacate the Order of Remand. That Petition with the Statement of Reasons Why the Writ should Issue are set forth in the Appendix hereto, pp. 14a-59a. The contentions made in the Court of Appeals fell into three (3) major categories: 1) remand based upon the addition, after removal, of a nondiverse, nonindespensable party in view of "strong equities" is a ground not permitted by, and affirmatively predicated upon grounds wholly different from those described in 28 USC §1447(c), and, therefore, is reviewable and should be vacated by mandamus; 2) the "form" order actually entered by Respondent was a "sham" not reflecting either the content, tenor, or substance of the ruling of September 23, 1982 and, therefore, was reviewable and should be vacated by mandamus; and 3) the conduct of the Respondent in his remanding of the matter deprived Petitioner of due process regarding its right to a federal forum. Therefore, the Order of Remand predicated upon such conduct was reviewable and should be vacated by mandamus, without regard to whether or not such an Order was otherwise unreviewable.

On October 22, 1982, Respondent filed a Response in Opposition to the Petition. Plaintiffs filed their Response in Opposition to the Petition on December 8, 1982. These Responses in Opposition are set forth, respectively, in the Appendix hereto, pp. 60a-62a, pp. 62a-65a. On December 10, 1982, the Court of Appeals

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remanded. The only items really discussed in relation to remand are totally absent from the Order; to-wit, there is no mention therein that "strong equities" favored the amendment nor of the discussion regarding Dow not being an indispensable party nor of the finding that, in any event, there was no need to show such to grant the amendment.

entered an Order Denying The Petition because it had no jurisdiction to review the Remand Order, "once the nondiverse party was added" (*although no order was ever entered adding the nondiverse party*).

REASONS WHY THE WRIT SHOULD ISSUE

INTRODUCTION

As already noted, the Petitioner has no appellate right of review of the Remand Order entered by Respondent. Moreover, 28 USC §1447(d) would appear to preclude all review by mandamus under the All Writs Act, 28 USC §1651(a), or otherwise. However, as argued, *infra*, in this Petition, and in the Court of Appeals Appendix, pp. 35a-54a, Petitioner asserts that the peculiar procedural manner in which this case comes to the Court in conjunction with *Thermtron Products Inc.* v *Hermansdorfer*, 423 US 336 (1976), renders the remand order reviewable as within the mandamus jurisdiction and prerogative process of this Court.

Further, even should this Court elect to ultimately deny issuance of a writ of mandamus, both the jurisdictional and substantive questions presented are in and of themselves of such significance as to warrant issuing a writ of *certiorari* for a full consideration on the merits. Indeed, the jurisdictional questions are of such moment — particularly those relative to the unique place and powers the Constitution delegates to this Court — as to warrant a consideration on the merits even if they are answered in the negative. Moreover, there is a substantial conflict among the Circuit Courts of Appeals relative to the underlying substantive question (Question I) of whether or not, in an otherwise properly removed action, a nondiverse, nonindispensable party may be added to defeat diversity and whether or not remand based thereon is permitted under 28 USC §1447(c). Only this Court can resolve that conflict.

I.

The Joinder, in Properly Removed Action, of a Nondiverse, Nonindispensable Party Whose Presence Defeats

Diversity and An Order of Remand Based on Such Joinder Constitutes a Nondiscretionary Erroneous Act Which Calls For This Court to Exercise Its Power of Supervision Over Respondent and Over the Court of Appeals for Sanctioning His Conduct.

The underlying substantive question in the matter here presented is of such great significance to both a harmonious federalism and a consistent application of federal procedure that it is first addressed.

May a District Judge in an otherwise properly removed action, order joinder of a nondiverse, nonindispensable party and then remand the action based upon such joinder?

The removal statute, 28 USC §1447(c), provides that an action can be remanded only when "it appears that the case was removed improvidently and without jurisdiction, . . ." Due to the general unreviewability of remand orders in the Courts of Appeals, however, the state of the law as to what this language means and under what circumstances remand is or is not appropriate has to be, at best, balkanized. At the very worst, it is submitted, experience teaches that District Judges solipsistically remand cases, irrespective of statutory grounds, for judicial "housekeeping" or other reasons they may deem appropriate, being sure only to 'cover their tracks' by couching their remand orders in terms of 'the improvidence of removal and the lack of jurisdiction.'

Because this Court has never addressed the question presented nor provided a detailed construction of 28 USC §1447(c) (except to articulate that remand for docket control is not permitted *see Thermtron Products Inc.* v *Hermansdorfer*, 423 US 336) and because the Courts of Appeals are generally unable to address the removal statute in view of the proscriptions of 28 USC §1447(d), it is all the more compelling that this Court grant this petition for *certiorari* and conclusively resolve the problem for the entire federal system. The question eludes review, and if the Court avoids it in this matter, the ensuing disharmony in the precedents and the federal system will continue indefinitely. Even if this Court were to rule that it

had no jurisdiction to review the question, *ipse dixit* regarding the proper construction and application of the remand statute relative to the addition of parties or otherwise, would at least provide the lower federal judiciary with a workable standard relative to remand. The vast majority of District Judges must surely welcome such direction. As things stand now, however, there is not even uniformity of precedents within the Circuits, much less a national standard for remand or a uniform construction of §1447(c).[6] Only this Court can alleviate these incongruities and difficulties by granting *certiorari*.

From the early days of the Republic, one of the cornerstones of our federal judicial system has been the principle that once federal court jurisdiction attaches, the litigants cannot, by subsequent acts (nor can subsequent events of their own force) oust that jurisdiction, whether such arose originally or by virtue of removal. *See Mollane* v *Torrance*, 22 US (9 Wheat) 537 (1824). Correlatively, the critical time frame for measuring the propriety of removal from state court and the existence of federal court jurisdiction under 28 USC §1447 has been *the time of the filing of the removal petition;* subsequent events deemed irrelevant. *See Saint Paul Mercury Indemn. Co.* v *Red Bar Cab Co.*, 303 US (1938); *Mansfield, Coldwater & Lake Mich. Ry* v *Swan*, 111 US 379 (1884); *Hart & Weschler, The Federal Courts & The Federal System* 1062, 1218 (2d ed 1973).

Nevertheless, and despite the fact that the Sixth Circuit has explicitly recognized this principle, *Television Recpt. Corp.* v *Dunkan*, 426 F2d 174, 177 (6th Cir 1970), the Respondent ordered the remand *wholly* based upon events *subsequent* to removal; events (i.e. the joinder of the nondiverse, nonindispensable party) he affirmatively ordered! In view of such a nondiscretionary act departing from this long line of established precedents, this Court should grant the writ of *certiorari*, review the case upon the merits and then exercise its supervisory powers over the Respondent and over the Court of

[6] Compare and contrast the authorities cited in notes 10-11 *infra*.

Appeals for sanctioning this departure from such authorities.[7]

There appears, however, to be one contemporary opinion from a Court of Appeals in conformance with the position taken by the Respondent (although not cited by him), notwithstanding the decisions of this Court rendering the time of removal as the universal benchmark for determining jurisdiction. *Desert Emp. Bank* v *Insurance Co. Of No. Am.*, 623 F2d 1371, 1376 (9th Cir 1980) That decision and the position of the Respondent as sustained by the Sixth Circuit, when compared with the overwhelming majority of decisions of the Circuit Courts bearing upon the point to the contrary, creates a conflict as to the application of the principle in the context of the joinder of nondiverse parties. *Compare In re Merrimack Mut. Fire Ins. Co.*, 587 F2d 642, 647 n8 (5th Cir. 1978); *Chiodo* v *General Waterworks Corp.*, 380 F2d 860, 867 (10th Cir 1967); *Reynolds* v *Wabash R.R. Co.*, 236 F2d 387 (8th Cir 1956). Only this Court can resolve this conflict.

Additionally, the Congress and this Court, while performing their rulemaking functions, 28 USC §2071, have given life to this universal principle of measuring removal jurisdiction and propriety at the time the petition for removal is filed, as it

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[7] It must be emphasized that the clear conjunctive language of 28 USC §1447(c) would appear to require *both* improvident removal *and* removal without jurisdiction. *See Sheet Metal Worker's Int'l Ass'n AFL-CIO* v *Seay*, 693 F2d 1000, 1005 & nn7-8 (10th Cir. 1982). Nevertheless, the Fifth Circuit has apparently elected to read this language in the disjunctive, *Robertson* v *Ball*, 534 F2d 63, 65 n2 (5th Cir 1975), but even then narrowly construes "improvidently" to mean procedurally defective. *In re Merrimack Mut Fire Ins Co*, 587 F2d 642, 645 n3 (5th Cir 1978).

In the instant matter, remand was predicated upon joinder - long after removal - of a nondiverse, nonindispensable party because "strong equities" favored having everyone before the same trier of fact. Although Petitioner has vehemently contested below the remand being characterized as one based on lack of jurisdiction (see Appendix pp. 36a-37a) — jurisdiction indisputably existing at the time of removal, and because the order' granting the amendment to add the nondiverse party was *never* entered — nevertheless, there was *never* any question of or discussion regarding the improvidence of removal. The Respondent's unarticulated reading of §1447(c), therefore, was necessarily in the disjunctive, and presents this Court with the opportunity to resolve a split among and between the Circuits and a reading of an Act of Congress by Courts of Appeals contrary to its plain and obvious meaning.

relates to the joinder, subsequent to proper removal, of nondiverse parties. 28 USC Rule 19(a) *forbids* the joinder of even an indispensable party, only permitting, under 28 USC Rule 19(b), the court to dismiss the case or to continue on without the nondiverse party. Application of this principle of jurisdictional preservation is at its zenith when a nondiverse, nonindispensable party is sought to be added under 28 USC Rule 21.

Notwithstanding this clear mandate, however, Respondent here ruled that the nondiverse, nonindispensable party must be added in view of "strong equities." Neither the rules nor the remand statute authorize such discretionary grounds for either adding a party whose presence destroys federal jurisdiction or a remand base thereon. Indeed, this Court has recently reiterated that "it is axiomatic that the Federal Rules of Civil Procedure do not create or *withdraw* federal jurisdiction . . ." *Owens Equip & Er. Co.* v *Kroger*, 437 US 365, 370 (1978) (emphasis supplied).

Moreover, 28 USC §1447(c) must be read in conjunction with 28 USC Rule 19, 20 & 21 to determine that such a remand is not thereby contemplated. The vast majority of the Circuit Courts of Appeals and District Courts that have addressed these problems have ruled that a nondiverse party cannot be joined and neither can a case be remanded based upon such joinder. Only if the party is indispensable and the action cannot proceed without that party will federal jurisdiction be destroyed — and only then by *dismissal*.[8] There is, however, one Court of Appeals decision that authorizes such a joinder and remand.[9] This, in conjunction with the position adopted by the Respondent and as *sub silentio* sustained by the Sixth Circuit, evidences a serious circuit split that only this Court can resolve.

Correlatively, regardless of whether viewed as a matter of rule and/or statutory construction or as an application of the universal principle that subsequent events cannot oust or alter removal jurisdiction, the vast majority of lower federal courts

[8] *See* note 10 *infra*.

[9] *See* note 11 *infra*.

that have addressed the question have held that a District Court cannot add a nondiverse, nonindispensable party to an otherwise properly removed action and then remand.[10] There

[10] The majority of Federal District Courts and Circuit Courts of Appeals having addressed the question have held that after a proper removal (as determined at the time of removal), the District Court has no discretion (and/or that it is improper) to add a nondiverse, nonindispensable party and then remand. *See, e.g., IMFC Prof* v *Latin Am. Home Health*, 676 F2d 152, 159 n14 (5th Cir 1982) (issue should be squarely addressed); *In re Merrimack Mut Fire Ins. Co.*, 587 F2d at 647 n8; *Chiodo* v *General Waterworks Corp.*, 380F2d 860, 867 (10th Cir 1967) (even indispensable party cannot be joined if it would destroy the jurisdiction of the court and if indispensable party cannot be joined court should dismiss action); *Reynolds* v *Wabash R.R. Co.*, 236 F2d 387 (8th Cir 1956) (no power in federal district judge to add nondiverse party whose presence would destroy jurisdiction); *Wallace* v *Knapp-Monarch Co.*, 234 F2d 853, 860 (8th Cir 1956) (Court affirms trial court refusal to add nondiverse party citing *Red Cab Co.* but there is dicta that the power to amend is discretionary); *Thorp* v *Petrola*, 81 F.R.D. 513, 515-16 (N.D. W. Va 1979) (nondiverse, nonindispensable parties cannot be added nor can nondiverse, indispensable parties be added; construction of explicit language of Rule 19, 20 and 21 control over Rule 15; "if the court were to allow the adding or dropping of parties pursuant to a motion under Rule 15, which would deprive the court of subject matter jurisdiction, the policy of Rules 19, 20, and 21 would be emasculated merely by ignoring it"); *Skinner* v *American Oil Co.*, 470 F Supp 229, 235 & n2 (S.D. Iowa 1979) (attempt to join nondiverse Defendant following remand irrelevant for purpose of determining whether to remand; indeed, because of Rule 19 improper to add such a Defendant); *Perimeter Lighting Inc.* v *Karlton*, 456 F Supp 355, 359-60 (N.D. Ga. 1978) (removability determined at the time of filing the removal petition and acknowledges authority prohibiting amendment of nondiverse party after proper removal); *Barrett* v *McDonald's Of Okla. City*, 419 F Supp 792, 793 (W.D. Oklahoma 1976) (Court should ignore addition of nondiverse party by Plaintiff because removal is viewed at time removal petitoin is filed); *Harper Fin. Corp.* v *Hanson Oil Corp.*, 403 F Supp 1405, 1407 (W.D. Tenn. 1975) (amendment not permitted to add nondiverse Defendant unless amendment also substantially alters the very nature of the cause of action); *Fort Howard Paper Co.* v *Affiliated F.M. Ins. Co.*, 60 F.R.D. 62, 63-64 (E.D. Wis. 1973) (Court must protect Defendant's right to removal and not allow amendment to include parties whose presence could oust the Court of jurisdiction); *Alexander* v *Lancaster*, 330 F Supp 341, 343 (W.D. La. 1971) (attempts to join any nondiverse party after proper removal irrelevant to remand-must view diversity only at time of removal); *Checker Motors Corp.* v *Chrysler Corp.*, 39 F.R.D. 37, 38 (S.D. N.Y. 1965) (to bring in parties by amendment, Rule 13(b) requires that their presence not defeat the Court's jurisdiction); *Pacific Gas & Elec. Co.* v *Fireboard Prod. Inc.*, 116 F Supp 377 (N.D. Cal. 1953) (removal's propriety determined at time of removal and any conflict in Rule 15 regarding amendment must be considered with specific language in other rules precluding destruction of jurisdiction;

appear to be, however, a few opinions to the contrary.[11] This

remand to add nondiverse party not allowed). *See also Television Recpt Corp.* v *Dunkan*, 426 F2d 174, 177 (6th Cir 1970) (federal removal jurisdiction not defeated by events occurring subsequent to commencement of action).

[11] There are authorities subsequent to *Thermtron (see* this footnote *infra)* that have held that under some circumstances remand subsequent to removal by virtue of the addition of nondiverse parties is appropriate. Petitioner submits these authorities are clearly erroneous in view of the fact that *Thermtron* itself forbids discretionary remand and because none really deal with the explicit language of Congressionally mandated policy expressed in 28 USC Rule 19, 20 & 21. Indeed, it would appear that explicit language in Rule 19 regarding indispensable parties states they cannot be added if their presence would "deprive the Court of jurisdiction over the subject matter." The only thing the District Court can do is dismiss the action. *Skinner* v *American Oil Co.*, 470 F Supp 229, 233-34 (S.D. Iowa 1979).

Notwithstanding this, however, the contra authorities (*see* this footnote *infra*) are thoroughly inapposite here because, first, the Respondent did not make even the slightest intimation that he was referring to or relying upon them. Second, the Respondent explicitly relied upon the discretionary ground that "strong equities" required joinder, while none of the contra authorities has *ever* articulated such a discretionary and nonstatutory ground for remand without a thorough weighing of the adverse jurisdictional effects, contra authorities, and the possibility of collusive jurisdiction. Third, most of the courts permitting remand have not discussed the indispensable/dispensable distinction; Respondent here, by contrast, stated that Dow was not indispensable (and/or that that distinction was irrelevant). *Soam Corp.* v *Trame Co.*, 506 F Supp 302 (S.D. N.Y. 1980); *Littlefickl* v *CNA, 475 F Supp 887 (C.D. Cal. 1979); Miller* v *Davis*, 464 F Supp 458 (D.D.C. 1979); *Ingersoll* v *Pearl Assum. Co.*, 153 F Supp 558 (N.D. Cal. 1957); *Highway Constr.* v *McClelland*, 15 F2d 187 (8th Cir 1926) (decided under different rules of procedure). Fourth, some of the Courts have said an amendment that defeats diversity should not be granted unless it also contemplates a substantial alteration of the nature of the cause of action-something clearly not involved here. *Miller* v *Davis*, 464 F Supp 458, 460 (D.C.C. 1978); *Harper Finc. Corp.* v *Hanson Oil Co.*, 403 F Supp 1405, 1407 (W.D. Tenn. 1975).

Finally, the few courts which have erroneously allowed the permissive joinder of a nondiverse, nonindispensable party have explicitly predicated their exercise of such *discretionary* power upon a very careful consideration of whether the requested amendment is but a collusive means of obtaining return to the forum formerly selected by Plaintiff. *Desert Emp. Bank* v *Insurance Co. Of No. Am.*, 623 F2d 1371, 1376 (9th Cir 1980); *Shaw* v *Mumford*, 526 F Supp 1209, 1215 (S.D. N.Y. 1981). There is absolutely nothing in this record to establish that Respondent considered such important factors. Therefore, even under application of these authorities which Petitioner contents are erroneous — authorities of which the District Court was totally unaware — Respondent's actions are not only erroneous, but clearly abusive of discretion.

alone warrants review by this Court since the Circuits have reached different results for at least twenty five (25) years. Moreover, assuming *arguendo* the few opinions supportive of Respondent's ordering joinder are correct, none supports his rationale (or lack thereof).[12] Rather, like Judge Hermansdorfer in *Thermtron*, Respondent completely ignored his affirmative duty to remand only for reasons authorized by the statute. The unprecedented remanding of the case for "equitable reasons" calls for this Court to exercise its supervisory powers over the Respondent and over the Court of Appeals for not correcting this clear abandonment of duty and abuse of discretion. *See Sheet Metal Worker's Int'l Ass'n AFL-CIO* v *Seay*, 693 F2d 1000 (10th Cir 1982) (court issues a writ of mandamus to vacate remand granted because it was more "equitable" for Plaintiff to be in state court due to federal limitation upon remedies).

II.

This Court Has Never Considered Whether a Remand Predicated Upon Joinder, In an Otherwise Properly Removed Action, of a Nondiverse, Nonindispensable Party Whose Presence Defeats Diversity, is Reviewable in this Court or in the Court of Appeals by Mandamus. Moreover, the Question Presents this Court with an Opportunity to Clarify Earlier Opinions.

This Court has never squarely addressed the question of whether an order of remand based upon the joinder of a nondiverse, nonindispensable party is reviewable by mandamus, either here or in the Court of Appeals. All of the reasons asserted relative to the need for the Court to grant *certiorari* and resolve the merits of the question of whether such joinder is permissible are reasserted to establish the need to grant *certiorari* to resolve the antecedent jurisdictional question of whether or not the remand order can be reviewed and vacated by mandamus.

In *Thermtron Products*, this Court construed 28 USC §1447(d) in *pari materia* with 28 USC §1447(c), and concluded "that

[12] *See* narrative in note 11 *supra* relative to the comparison of the precedents therein cited, with Respondent's ruling.

only remand orders issued under §1447(c) invoking the grounds specified therein — that removal was improvident and without jurisdiction — are immune from review under §1447(d)." *Id.* at 346. Reviewability under *Thermtron*, therefore, necessarily reverts back to an inquiry into the merits of whether the remand is proper under, or authorized by §1447(c). In fact it was specifically noted that,

> We are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute.

Id. at 351.

Such language is clearly apposite here. For the Respondent, without even a recitation of the statute or mention of the grounds permitting remand therein, concluded in his ruling, that "strong equities" favored joinder of a nondiverse, nonindispensable party — grounds wholly unrelated to those recognized by 28 USC §1447(c) but apparently justifiable to him. The Fifth Circuit Court of Appeals has recognized that such joinder of a party constitutes an improper ground for remand warranting vacation by mandamus.[13]

Moreover, there is absolutely nothing in the remand statute,

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[13] *In re Merrimack Mut. Fire Ins. Co.*, 587 F2d 642, 646-47 & n8 (5th Cir 1978). Although that Court went on to deny the writ because of an ambiguity in the order, the *Merrimack* Court did explicitly recognize, by footnote, that permitting joinder of a nonindispensable, nondiverse defendant clearly was outside of a District Court's discretion, and that such an exercise of discretion was one outside of the exclusive grounds of 28 USC §1447(c) and hence a remand predicated thereon was reviewable by mandamus. *Id.* at 647 & n8.

In fact, the Fifth Circuit has recently restated the importance of the question," [w]e reserve for decision when the issue is squarely presented whether a district court may allow joinder of a nondiverse party who is not indispensable even though such joinder may result in remand." *IMFC Prof.* v *Latin Am. Home Health*, 676 F2d 152, 159 n14 (5th Cir 1982). Additionally, the Tenth and the Seventh Circuit have held that remands based upon discretionary grounds not found in 28 USC §1447(c) are subject to review by the Court of Appeals by mandamus and must be vacated. *Sheet Metal Workers Int'l Ass'n AFL-CIO* v *Seay*, 693 F2d 1000, 1002, 1005 & n7 (10th Cir 1982); *Ryan* v *State Bd. of Elections of State of Ill.*, 661 F2d 1130, 1133 (7th Cir 1981).

28 USC §1447(c), that even remotely resembles as grounds for remand the addition of parties whose nonindispensable presence destroys otherwise proper jurisdiction because "strong equities" compel that presence "so that in one lawsuit a proper fact finder can in due course make a determination with everyone in front of it." Appendix, p. 30a. The Tenth Circuit recently vacated, by mandamus, a remand based on the ground that the state court was "the most equitable forum," in view of a restriction of federal remedies. *Sheet Metal Workers' Int'l Ass'n AFL-CIO* v *Seay*, 693 F2d 1000, 1002 & n2 (10th Cir 1982). The Court of Appeals reasoned that this was not a ground authorized by §1447(c) and then analogized the nonstatutory ground asserted to those utilized in *Thermtron*. In both instances, the District Judges had erroneously ordered remand because the 'plaintiff's rights of redress was being severely impaired.' *Id.* at 1005, *citing Thermtron* v *Hermansdorfer*, 423 US at 340-41. In the instant matter, the Respondent also improperly ordered remand because he felt Plaintiffs' right of redress was impaired in federal court. For that reason Respondent's Order of Remand should be similarly vacated.

There are also facts or events peculiar to this case which not only evidence a remand affirmatively predicated upon non statutory grounds, but which also warrant this court exercising its supervisory power over Respondent. First, the Order of Remand that Respondent entered *sua sponte* on September 27, 1982 bore absolutely no resemblance to the ruling upon which he actually based the remand. Petitioner submits (as discussed in detail elsewhere in this Petition and extensively in the court below Appendix, p. 4a), that the Order was a "sham."

Second, unlike any remotely analogous situation in any reported decision, the parties here *were actually still diverse* at the time the Court entered the Order of Remand. No written Order had been entered at that time (or at anytime) permitting the Amended Complaint. Dow Chemical Company, the alleged nondiverse Defendant, *was not before the District Court* even as a named, but unserved Defendant. Therefore, even the untenable ground for the remand — that "equity" required the

nondiverse' nondispensable Dow Chemical's presence in the suit — did not in fact exist when the Remand Order was entered!

Third, the unstated but possibly controlling motive for the *sua sponte* September 27, 1982 Remand Order was to clear the matter from his overcrowded docket by the end of the month. This concern over an overcrowded docket was precisely the disapproved rationale utilized by Judge Hermansdorfer in *Thermtron*.

Your Petitioner is not unaware that the most recent decision of this Court addressing the reviewability of remand orders by mandamus, *Gravitt* v *Southwestern Bell Tel. Co.*, 430 US 723 (1977), involved an erroneous, and yet unreviewable understanding of the absence of diversity jurisdiction which precipitated remand. None-the-less, *Gravitt* is inapposite here for a variety of reasons. Foremost of these is that the Respondent Judge, in his discussion allowing the amendment in view of "strong equities," which he noted would 'destroy diversity automatically,' acknowledged that federal jurisdiction was entirely proper and present! Cf. *Ryan* v *State Bd. of Elections*, 661 F2d 1130, 1333 & n3 (7th Cir 1981). The Court of Appeals completely ignored this fact when it ruled that *once* the nondiverse party *was added*, remand was proper.

Moreover, it should also be noted that subsequent to what has been characterized as the terse *Gravitt* per curiam,[14] the Courts of Appeals have been faced with ambiguity and an absence of clarity relative to the avenue of reviewability opened by *Thermtron*. Most of them have taken *Gravitt* as a signal from this Court that unless "the order does not clearly rely on reasons other than those permitted under the statute," i.e., 28 USC §1447(c), "the remand order cannot be reviewed."[15] Only

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[14] *See* Note, *Remand Order Review After Thermtron Products*, 1977 Ill. L. Forum 1086, 1103.

[15] *In re Chevron Chemical*, Slip Op. at 2 (6th Cir. No. 82-8063, December 10, 1982); *Chesapeake & Ohio Rwy Co.* v *U.S. District Court*, Slip Op. at 2 (6th Cir. No. 82-1155, May 21, 1982); *State Farm Mut. Aut Ins.* v *Baasch*, 644 F2d 94, 96 (2nd Cir. 1981); *In re Weaver*, 610 F2d 335, 337 (5th Cir 1980);

in the rarified and exceptional case where the District Judge does not mention the statute or the standards of remand of §1447(c), *and* thereafter affirmatively states grounds for reversal not contained therein, do the Circuits obviously believe that they may review an order of remand by mandamus.

Some of the Courts have stated it somewhat differently focusing in on restrictive language appearing in *Thermtron* and, at least to their understanding, adhered to and reiterated in *Gravitt*: "if a trial judge *purports* to remand a case on the ground that it was remanded 'improvidently and without jurisdiction,' his order is not subject to challenge in the Court of Appeals . . . ."[16] Despite such restrictions, however, the Courts of Appeals subsequent to *Gravitt*, have, with a concomitant frequency, issued writs in the nature of mandamus compelling District Judges to vacate orders of remand.[17]

Given the convolutions of the state of the law in this area, it is difficult for litigants and the Courts of Appeals to determine when review by mandamus is authorized and appropriate and when it is not. One Circuit has attempted a workable and simplified definition relative to the limits of its authority:

> It thus appears that where we are specifically forbidden to review action by a district judge when the judge

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In re Greyhound Lines Inc., 598 F2d 883, 884-85 (5th Cir 1979); *In re Merrimack Mut. Fire Ins. Co.*, 587 F2d 642, 647 (5th Cir 1978). *See also Levy* v *Weissman*, 671 F2d 766, 769 & n9 (3rd Cir 1982). *See also* Note, *Remand Order Review After Thermtron*, 1977 Ill L. Forum 1086, 1103-04.

[16] *Royal* v *State Farm & Cas Co.*, 685 F2d 124, 126 (5th Cir 1982), *citing, Thermtron Products Inc.* v *Hermansdorfer*, 423 US at 343 (emphasis in *Royal*).

[17] *See, e.g. Sheet Metal Worker's Ass'n AFL-CIO* v *Seay*, 693 F2d 1000 (10th Cir 1982); *Levy* v *Weissman*, 671 F2d 766 (3rd Cir 1982); *In re Shell Oil Co.*, 631 F2d 1156 (5th Cir 1980); *In re Carter*, 618 F2d 1093 (5th Cir 1980), *cert denied*, 450 US 949 (1981); *In re Greyhound Lines, Inc.*, 598 F2d 883 (5th Cir 1979). *See also, Ryan* v *State Bd. of Elections*, 661 F2d 1130 (7th Cir 1981); *Merrill, Lynch et al* v *Gayden*, 637 F2d 391, 396 n9 (5th Cir 1981); *Three J. Farms, Inc.* v *Alton Box Bod Co.*, 609 F2d 112 (4th Cir 1979) (mandamus appropriate to vacate vacation of remand); *In re Merrimack Mut. Fire Ins. Co.*, 587 F2d 642 (5th Cir 1978) (although writ would not lie in case regarding ambiguous order, clearly improper ground of remand after allowing amendment of nondiverse, nonindispensable party would warrant issuing the writ).

> is authorized to act, *it may, nevertheless be our duty to decide whether or not the action was, indeed, authorized.* Erroneous action taken within authority may not be corrected; *unauthorized acts may be curbed.*

Meadows v *United States*, 665 F2d 1009, 1012 (11th Cir 1982) (emphasis supplied).

It is apparent, however, that even under this simplified articulation, the joinder of a nondiverse, nonindispensable party and basing remand thereon, necessarily mandates inquiry into the merits of remand; an inquiry not even attempted in this instance by the Sixth Circuit Court of Appeals.[18] *See also Thermtron Products, Inc.* v *Hermansdorfer*, 423 U'S at 356 (Rehnquist, J, dissenting). Moreover, whether or not these same limitations apply to review *in this* Court was not addressed in *Thermtron* or *Gravitt*. In view of this confusion and lack of clarity, this Court should grant a writ of *certiorari* to clarify and harmonize *Thermtron* and *Gravitt* and delineate when review by mandamus is appropriate in the Court of Appeals and/or in this Court.

III.

The Entry of a "Sham Order" of Remand Calls for this Court to Exercise Its Power of Supervision Over Respondent and Over the Court of Appeals for Sanctioning His Conduct. Moreover, This Court Has Never Addressed Whether It Can and/or Should Exercise That Power

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[18] "Of more importance is the elimination of dissatisfaction by the general public with our system of jurisprudence, a goal which can best be accomplished by reducing the possibility for error and increasing the likelihood of uniformity of decisions. Congress should seriously consider repeal or amendment of the removal statutes to allow appellate review of remand orders. *In the interim the judiciary should, at a minimum, reduce the complexity of this issue by inquiring through mandamus into the grounds underlying those remands which do nothing more than recite the "improvidently removed" and "without jurisdiction" language.* Such a policy may result in the ultimate reduction of delay in the federal courts and even the elimination of unnecessary litigation. It will certainly have the salutary consequences of abrogating the abuses which permeate this area of the law and ultimately advancing the interests of justice."
Myers, *Federal Appellate Review of Remand Orders: Expansion or Eradication?* 48 Miss. L.J. 741, 754 (1977) (emphasis added).

Regarding Such a "Sham Order," Notwithstanding 28 USC §1447(d). Additionally, The Question Has Been Explicitly Cited by Members of This Court as a Ground for Granting *Certiorari* and Presents the Court with an Opportunity to Harmonize Earlier Opinions.

Petitioner further contends that the Respondent's entry of the September 27, 1982 Remand Order which was thoroughly dissimilar to the content, substance or tenor of his ruling of September 23, 1982, constitutes a severable and separate abuse of discretion reviewable by mandamus. It is respectfully submitted, that the September 27, 1982 Order is a sham, or at best an order entered with gross disregard for either the statutes or due process. By way of background, it is important to note that there was a breakdown of the adversary processes in relation to the remand so as to deprive Petitioner of the most rudimentary aspects of due process of law. Respondent, *one day after transfer* of the case to his docket and one day after the filing of the Motions to Amend and for Remand, orally ordered counsel to appear at a Remand Hearing *the following day*. At that hearing, the Respondent refused to address the correctness of the original removal as well as Petitioner's request to present papers in opposition and then and there ordered remand because, he felt, the equities justified it. By thus acting impetuously and arbitrarily, the Respondent precluded Petitioner from presenting a legion of arguments as to why remand was not permitted and further illustrated his intention to remove the matter from his docket, without regard to the law.

If this were not enough to establish the non-adversarial and unconstitutional characteristics of Respondent's conduct, it is important to also note what happened subsequent to the remand hearing. Petitioner adamantly intended on pursuing presentment of order proceedings but, again, the adversarial process was aborted by Respondent's *sua sponte* entry of the Remand Order before the end of September. Had counsel been permitted to participate as to the Order's form, they would have been able to demonstrate that the record bore

absolutely no resemblance to the language of the Order and also that no order granting the amendment had ever been entered.

There was absolutely nothing in the Court's September 23, 1982 ruling, counsels' argument or the moving papers of the Plaintiffs that intimated improvident removal. Similarly, the 'standard form' language ("it appearing that there is no federal jurisdiction in the above-entitled matter" with the words "lacking total diversity" typed in thereafter), does not comport in the slightest with the then present posture of the case, the Court's rulings or Plaintiffs' moving papers.

Lest Respondent's mere recitation of the words, "there is no federal jurisdiction," lead to the misunderstanding that this was an erroneous, but nevertheless unreviewable finding, *it is essential to again note that Respondent acknowledged the presence of diversity jurisdiction prior to considering the motion to remand because he admitted such was capable of being "destroyed" if he granted the amendment.*

Simply put, the form language of the Remand Order does not, in the slightest, reflect the content of the Respondent's ruling nor does it contain anything reflecting the real basis for the remand, i.e., the totally arbitrary finding that "equity" required the amendment. Moreover, the Order claims the case "lacks diversity" when *in fact* no Order of Amendment was *ever* entered. By entering the Remand Order the Respondent did not merely compound his error, he implemented one unauthorized act by committing another.

Ironically, the very grounds the Petitioner asserts constitutes a separate ground warranting the use of mandamus, i.e. the entry of an Order that does not in the least comport with Respondent's ruling, might sadly be said to be an item which might altogether preclude review. One Court of Appeals, in dicta and in acknowledging its understanding of what *Gravitt* compels, has stated that a mere recitation of §1447(c), or of the grounds therein, automatically insulates a remand order from review, irrespective of the grounds upon which the Judge has

based his ruling.[19] Various scholars have also so read *Gravitt* but not without first severely criticizing such a result.[20] Petitioner recites this state of affairs and understanding of the law if only to demonstrate the absurdity of the position. Courts and scholars find it unpalatable that the utterance of a talisman by a trial judge makes his actions totally immune from review of either the circumstances of the case or the extent of his arbitrariness. Yet, such will continue to be the legacy of *Gravitt* unless the Court grants *certiorari* and thereafter corrects such abuse by issuing its writ of mandamus.

Although the "magic word" understanding of unreviewability might arguably be an educated, but exaggerated extrapolation of this Court's precedents, and although it appears to mandate repudiation, the question has never been faced full front by this Court. Justice Rehnquist prophetically recited the issue, and the fact that it would have to be addressed, in his dissent in *Thermtron:*

> (W)hat if the district court does state that it finds no jurisdiction, using the rubric of §1447(c), but the papers

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[19] *See Royal* v *State Farm Fire & Cas. Co.*, 685 F2d 124, 126-27 (5th Cir 1982); *In re Merrimack Mut. Fire Ins. Co.*, 587 F2d at 648 ("District Court invocation of §1447(c) will preclude review of a remand order no matter how clearly erroneous the order appears on its face"); *Robertson* v *Ball*, 534 F2d 63, 65(5th Cir 1975).

[20] "[A] district court apparently can insulate its remand order from any review under *Thermtron* by mechanically invoking the §1447(c) grounds for remand."
Note, *Remand Order Review After Thermtron Products*, 1977 Ill. L. Forum 1086, 1106.

"*Southwestern Bell* is particularly disappointing in that the Supreme Court placed emphasis exclusively on rote recitation of language and gave no consideration to the erroneous decision-making process underlying the remand order."
Meyers, *Federal Appellate Review of Remand Orders: Expansion or Eradication?* 48 Miss. L. J. 741, 754 (1977).

"Apparently, a remand order which so much as mentions "improper removal" will be precluded from review. Even mandamus will not lie to prevent a judge from remanding for reasons completely irrelevant to 1447(c) grounds, as long as his order recites "improper removal.""
Rible, *Federal Courts: Review of the Remand Order*, 9 St. Mary's L. J. 274, 285-86 (1977).

> plainly demonstrate such a conclusion to be absurd? Are potential challengers to such an order entitled to seek the aid of the court of appeals, first to demonstrate that the order entered by the lower court was a sham and second to block that order pursuant to today's decision. If the Court's grant of certiorari and order of reversal in this case are to have any meaning, it would seem that such avenues of attack should clearly be open to potential opponents of orders of remand.

Thermtron Products Inc. v *Hermansdorfer,* 423 US at 357 (Rehnquist, J., dissenting). Several scholars agree that such a sham order must be reviewable.[21]

Despite this and the fact that the integrity of the entire judicial system is undermined when Judges enter "sham" orders, the Sixth Circuit Court of Appeals failed to even discuss the matter. To foreclose review by mandamus, under such circumstances, would not only serve to emasculate *Thermtron* and the effectiveness of the great prerogative writ to correct injustice, but reward abuse if "validated" by hollow recitations. Moreover, in view of the Respondent's attempt to avoid review of his unconstitutional conduct by entering an "insulated order," it is even more compelling that the caviler and precipitous treatment afforded Petitioner be subject to review.

For these reasons, it is respectfully urged that this Court should issue its writ of *certiorari* and, after a full consideration upon the merits, thereafter either a) issue a writ of mandamus directly to the Respondent compelling him to vacate the remand order, or b) direct the Court of Appeals for

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[21] *"The ineffectiveness of precluding review by evaluating only the face of a remand order seems clear.* If the district judge in *Thermtron*, who remanded because of a crowded docket, had simply stated in the order that the case had been "improperly removed," his action would have been nonreviewable under the apparent logic of the per curiam decision in *Southwestern Bell.* The purpose of mandamus is to correct discretionary abuse. If such abuse may be precluded from review simply by masking the remand order as being pursuant to "improper removal," the avenue of appeal opened in *Thermtron* becomes virtually nonexistent."
Rible, *Federal Courts: Review Of The Remand Order,* 9 St. Mary's L. J. at 286.

the Sixth Circuit to issue a writ of mandamus to the Respondent compelling him to vacate said order.

IV.

The Case at Bar Presents the Court with a Unique Opportunity to: 1) Establish that the 1948 Judicial Code Did Not Eliminate this Court's Statutory Supervisory Power Over the Lower Federal Judiciary Derived from §§13-14 of the Judiciary Act of 1789; 2) Establish that this Court Has Inherent Supervisory Power Over the Lower Federal Judiciary; and, 3) Demonstrate that, Under Certain Circumstances, Congress Cannot Interfere with Such Powers of this Court, Although It Can Limit Analogous Powers of the Court of Appeals. Moreover, These Questions Have Never Been Definitely Addressed by this Court and Should Be Considered In View of the Far Reaching Impact They Could Have Upon Clarifying the Operative Powers, and Limitations Thereon, of the Judiciary and the Congress Under Article III.

Dissenting in *Thermtron*, Justice Rehnquist suggested that in view of the fact that Congress, under Art III, §1, had the sole constitutional prerogative to create the Courts of Appeals and their jurisdiction, it could, in any fashion, correspondingly limit that jurisdiction. *Thermtron Products Inc.* v *Hermansdorfer*, 423 US at 354, *citing, Sheldon* v *Sill*, 51 US (8 How) 441 (1850). Petitioner suggested in the Court below that even if this proposition were not debatable, (*but see* Sager, *The Supreme Court Term-1980 Forward: Constitutional Limitations on Congress' Authority To Regulate The Jurisdiction Of The Federal Courts*, 95 Harv. L. Rev. 17, 25-29 (1981)), such rationale could not dispossess *this* Court of jurisdiction to correct the otherwise arbitrary and capricious conduct of Respondent, it being a constitutional Court *not* created by Congress. Nevertheless, it would appear to be the view of at least one (or more) of the members of this Court that §1447(d) catagorically precludes review in *both* the Court of Appeals *and* this Court, *Thermtron Products Inc.* v *Hermansdorfer*, 423 US at 361 (Rehnquist, J., dissenting). However, the *Thermtron* majority suggested otherwise. Thus, by granting the writ of *certiorari* herein prayed

for, this Court not only has the unique opportunity to resolve this ambiguity but also has the opportunity to establish various far reaching principles relative to the extent of, and limitations upon the respective powers the Court and the Congress retain relative to the "judicial power" of the United States.

The reading of §1447(d) by the Sixth Circuit Court of Appeals, in the instant matter, squarely puts such issues before this Court; that review was precluded once the nondiverse party was added, and that presentation of grounds independent of the remand existed to issue a writ of mandamus would not be permitted. As a result, the question of whether or not the same bar does or *can* apply to the jurisdiction of this Court is clearly presented.

Simply put, did Congress intend to, or *may* it constitutionally impair the supervisory powers of *this* Court over the conduct of the inferior federal judiciary merely because that conduct occurred in the remand context? These questions have never been addressed, and, due to the fact that they go to the heart of the operation of the federal judiciary and, correlatively, to aspects of the inter-relationship that exists between Congress and the Federal Courts under Article III, they require resolution.

First, it is important to recognize that such an impairment of this Court's power to review and supervise the conduct of the inferior federal judiciary by mandamus would be to dismantle one of the greatest (and oldest) engines of justice ever devised. The great prerogative writ of mandamus is said to have its origins in that clause of the Magna Charta that declares "nulli vendemus, nulli negabimus, aut differemus rectum vel justitian" — to none will we sell, to none will we deny, or delay equity or justice. Magna Charta, Cl. 40. *See* T. Tapping, *The Law & Practice of the High Prerogative Writ of Mandamus* 56 (1853). Our common law heritage of the writ being that last resort to remedying judicial or quasi-judicial abusive conduct was put most aptly by Lords Mansfield and Wilmot when they said,

> [The Petitioner] has a right to come here for this writ, this great prerogative writ of mandamus, (a remedy which turns more, in my opinion, upon principle than upon precedent;) and we ought to grant it, because there is no other remedy.
>
> . . .
>
> If there is a clear right in [Petitioner], the Court ought . . . to find out a suitable and adequate remedy; and . . . even to have made a precedent, if they could not have found one: for where there is a right, law and justice require that there should be some remedy or other. . . ."

Rex v *Vice-Chancellor of Cambridge University (Earl of Hardwicke's Case)*, 3 Burr 1648, 1660; 97 E.R. 1027, 1033 (1765) (Mansfield & Wilmot, LJJ.). Moreover, there is no doubt that this noble history was incorporated into our constitutional framework so as to permit this Court to supervise the inferior federal courts. *See Ex Parte Crane*, 30 US (5 Pet) 190, 191-93 (1831) (Marshall, CJ). Indeed, the first judiciary act specifically authorized it. Judiciary Act of 1789, §13.

Petitioner primarily submits that Congress in enacting 28 USC §1447(d) could not have intended the abrogation of this Court's supervisory powers, to be exercised via mandamus in aid of its appellate jurisdiction and derived from §13 of the Judiciary Act of 1789, in correction and supervision of the conduct of the inferior federal judiciary. Particularly must this be true in those circumstances where grounds independent of remand exist for issuance of the writ, for such would clearly undermine both an independent judiciary and tarnish the authority of this Court as "Supreme." And this proposition is posited, notwithstanding dicta to the contrary, in *Ex Parte Pennsylvania Co.*, 137 US 451 (1890), which, parenthetically, appears to have been repudiated in *Thermtron Products, Inc.* v *Hermansdorfer*, 423 US at 343 (review precluded "*in the court of appeals* by appeal, by mandamus, or otherwise").

Second, and ancillary to this contention, this Court has the rare opportunity to definitely establish that §13 and §14 of the Judiciary Act of 1789, as they conferred supervisory powers

over the inferior judiciary upon this Court did in fact survive incorporation into §§234 & 262 of the Judicial Code of 1911 and further consolidation into the 1948 revision of the Code in the All Writs Act, 28 USC §1651(a). *See Chandler* v *Judicial Council*, 398 US 74, 127-28 n.15 (1970) (Harlan, J., concurring).

Third, although this Court's mandamus jurisdiction has long been determined to exist only in aid of its appellate jurisdiction and does not arise originally, *Marbury* v *Madison*, 5 US (1 Cranch) 137, 175 (1803), it is "[b]eyond" cavil, the issuance of a writ of mandamus to an *inferior court* is an exercise of appellate jurisdiction." *Chandler* v *Judicial Council*, 398 US at 96 (Harlan J., concurring), *citing, In re Winn*, 213 US 458, 465-66 (1909). Additionally, although it is generally agreed that while Congress may make exceptions to and regulations concerning the appellate jurisdiction of this Court by virtue of Art. III, §2, Petitioner would submit that there *must* exist some restrictions upon that power. *See* Sager, *The Supreme Court—1980 Term: Foreward*, 95 Harv. L. Rev. at 33 & n42. Even assuming *arguendo* that such was contemplated by 1447(d), this submission is particularly compelling when Congress, as here attempts to restrict a function fundamentally necessary to the operation of the federal judiciary — supervision of that judiciary by this Court. Petitioner would also suggest that perhaps the tension existing between the majority and the dissenters in *Thermtron* was an unarticulated disagreement over whether any such restrictions do or can exist upon this Congressional prerogative.

Finally, Petitioner further submits that having bestowed broad powers of supervision upon this Court by virtue of 28 USC §1651(a) or otherwise, Congress cannot constitutionally abrogate those powers relative to the correction of a Judge's abusive conduct even if such conduct occurs in a remand proceeding. *Cf. Thermtron Products Inc.* v *Hermansdorfer*, 423 US 336. Moreover, even if such power of supervision were not conferred by statute, it is submitted that it does exist for it is inherently necessary to the operation of this Court as "Supreme." Indeed, Art. III, §1 specifically categorizes this Court as "Supreme" in relation to "inferior courts" and that charac-

terization must, necessarily, carry with it the supervisory ability to act 'the part.' Such jurisdiction is, or would have to be self-effectuating although it is entirely appellate in nature. Therefore, Congressional attempts (e.g. §1447(d) as read by the Court of Appeals) to restrict the supervisory authority of this Court over Respondent in view of conduct independent of the remand would patently violate the doctrine of separation of powers for what lies at the core of Article III — the ultimate authority of this Court to review the acts of the federal judiciary — would be negated.

In view of the uniqueness of the questions discussed, this Court is respectively urged to grant its writ of *certiorari* and review this matter of its merits in order that the respective roles and limitations the Constitution delegates between this Court and the Congress under Article III may be defined. Thereafter, it is equally urged, that a writ of mandamus issue vacating the Remand Order entered by the Respondent.

CONCLUSION

For all of the aforementioned reasons, a writ of *certiorari* should issue to review the Order of the United States Court of Appeals for the Sixth Circuit. Alternatively, a writ of mandamus should issue to the Sixth Circuit compelling it to direct the Respondent to vacate the Order of Remand, or in the further alternative, this Court should issue a writ of mandamus directly to Respondent compelling him to do the same.

Respectfully submitted,

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DATED: February 21, 1983

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